

## **PRISONERS' RIGHT TO PROCREATE AND CONJUGAL VISITS IN INDIA: A CRITICAL ANALYSIS\*\***

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*"In a case where the innocent spouse is a woman and she desires to become a mother, the responsibility of the State is more important as for a married woman, completion of womanhood requires giving birth to a child. Her womanhood gets magnified on her becoming a mother, her image gets glorified and becomes more respectful in the family as well in the society. She should not be deprived to live in a condition wherein she has to suffer living without her husband and then without having any children from her husband for no fault of her."*

**-Rajasthan High Court<sup>1</sup>**

**Abstract-**The prisoners in India have been guaranteed various rights, in principle, ensuring their dignity, maintaining their privacy and providing an atmosphere wherein their all-round development and growth may take place. One of the rights of prisoners is right to procreate and conjugal visit which is directly related with human rights of prisoners and prisoners' partner. In the light of above facts, this paper unearths the relevant provisions relating to prisoners' right to procreate and conjugal visits in India in detail. Further, it gives some sensible suggestions also.

**Keywords-**Prisoners, Conjugal Right, Human Rights, Constitutional Rights.

### **Introduction:**

The present criminal justice system is based on the basic principle of serving the public interests by punishing the offenders, protecting the innocents and compensating the victims unlike earlier system where the single objective was to punish the offenders in such way which may cause deterrent effects and send a message to the society that others will not think to repeat for committing such offence. But, the developmental human rights jurisprudence brought the element of reformatory approach which is based on taking individuals as human beings and respecting their minimum human rights so that they also may be accommodated and rehabilitated in the society who have committed wrongs against the interests of the society. This theory is based on the connotation that any person is not born as criminal rather the social factors of the respective society are responsible for criminality of a person. From this aspect, the prisons should be taken as reformatory houses or hospitals where the criminals should be provided proper treatment which in turn will provide them opportunities to improve themselves and after release from prison they may contribute in building, reconstructing and developing the respective nation.

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<sup>1</sup> *Nand Lal v. State*, D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan)

**Understanding Prisoners' Right to Procreate and Conjugal Visits:**

One of the basic differences in living and non-living is the capacity of procreation. The power to procreate is associated with the basis of the evolution, creation and development of life on this planet. Thus, in general, the nature has given this right to every human being without any discrimination. Every individual likes to exercise this right which is directly linked with his/her life, liberty, dignity and freedom. In Indian culture and philosophy, there are sixteen sacraments (sanskars) out of which *Garbhadhan*, i.e. 'attaining the wealth of the womb' is a pious and holy sacrament which is, *inter alia*, intended to preserve lineage by conjugal association. In Hindu philosophy, every person is under obligation to discharge *pitri rinn* (parental debt) which is being carried and forwarded by our ancestors. Discharging this debt is the foundation of maintaining continuity of life. Further, as per Hindu philosophy there are four Purusharthas i.e. aims of human life-Dharma, Artha, Kama and Moksha-for every person. Out of four purusharthas, three (Dharma, Artha and Moksha) may be performed alone but the fourth i.e. Kama may only be performed in conjugal association of the respective spouse, if he/she is married. In conjugal visit, the prisoner is allowed to meet privately with his/her spouse in a given space ensuring privacy of the parties and they are allowed to establish intimate relationship.

Next, the spouse of the prisoner, being innocent, has also right to be in conjugal association with his/her spouse. Particularly, when the innocent spouse is woman, it is said that 'motherhood is the completeness of a woman'. The nature has given special power only to women to give new life by birth. When a woman acquires motherhood, not only her image is glorified rather she becomes more respectful in family as well as in society too. This is possible only through association of her husband. Thus, it may be said that to preserve the lineage, every person including prisoner has right to procreate by conjugal association with his/her legally wedded spouse.

In respect of prisoners, this is a general question-whether the prisoners have right to procreate and conjugal visits? Actually, the genesis of this question lies in the feudal argument that only the law abiding individuals have right to enjoy all the rights guaranteed by law. The prisoners, being the violators of law, should not be given any such right otherwise the purpose of keeping them within four-walls will frustrate. The supporters of this argument are in favour of subjecting the prisoners more and more in inhuman, unreasonable and undignified atmosphere without considering them as a human being. This was the situation not only in India rather in other countries also. This was general view of the society including government officials that a person in prison is guilty and his/her all rights are forfeited. Kerala High Court in *A Convict Prisoner in the Central Prison v. State of Kerala*<sup>2</sup>, said that "a prisoner who invites incarceration by his conduct, cannot expect the same freedom as free citizens." Even the courts were also hesitant in interfering with internal matters of the prison administration taking the plea of doctrine of separation of powers.

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<sup>2</sup> 1993 Cri LJ 3242

But, the modern concept of prison is evolved as a reformatory institution wherein the prisoners are considered as a human being having right to maintain their life, liberty, dignity etc. At the same time, it is also correct that the prisoners have not equal rights like a free person. The US Supreme Court in *Turner v. Safley*<sup>3</sup>, held that “a prison inmate retains those rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.” Lord Wilberforce in *Raymond v. Honey*<sup>4</sup>, said that “convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.” The modern judicial and human rights philosophy, being in favour of personal autonomy, defends to provide right to procreate and conjugal visits to every prisoner.

### **Prisoners’ Right to Procreate and Conjugal Visits: International Scenario**

At the international level, there are various instruments guaranteeing the rights of every individual which is equally available to prisoners also. In addition to this, there are some specific and special instruments which are directly related with prisoners’ rights. From the human rights aspects, the Universal Declaration of Human Rights<sup>5</sup> is a milestone document. Additionally, two covenants<sup>6</sup> have effectively covered the availability of human rights for all without any discrimination.

The Nelson Mandela Rules<sup>7</sup> in its Rule 58 has recognised the conjugal visits as under-

1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
  - (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
  - (b) By receiving visits.
2. Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.

In some countries, the prisoners have been granted the conjugal rights under the conjugal visitation programmes. In USA, the federal law does not provide such privilege but some of the States (California<sup>8</sup>, Mississippi<sup>9</sup>, New York, and Washington) have granted this right to prisoners which is known as ‘family

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<sup>3</sup> 482 U.S. 78, 85 (1987)

<sup>4</sup> [1982] 1 All ER 756

<sup>5</sup> Article 16 deals with right to marry and family.

<sup>6</sup> *International Covenant on Civil and Political Rights*, 1966 [General Assembly resolution 2200A (XXI)]; *International Covenant on Economic, Social and Cultural Rights*, 1966 [General Assembly resolution 2200A (XXI)].

<sup>7</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners *vide* United Nations General Assembly resolution A/RES/70/175.

<sup>8</sup> California allowed conjugal visit in 1968.

<sup>9</sup> First state to permit conjugal visits in 1918.

visiting program' or 'family reunion visits'. In other countries also like England and Wales, Denmark, Spain, and Sweden etc. the conjugal visit has been provided to the prisoners<sup>10</sup>. The procedure of application, duration, mode of conjugal meets vary from country to country.

### **Right to Procreate and Conjugal Visits: Indian Aspects**

The modern Indian prison system is based on mostly callous colonial compilations wherein the prisoners were treated not as valuable member of the society rather like objects. The prisoners' life and existence completely depends on the mercy of prison authorities. The maltreatment with prisoners, offences against them, corrupt practices and violation of their minimum rights are some of the features of Indian prison system. In such scenario, the question of right to procreate and conjugal meet could not be thought by the prisoners earlier but with the recognition of prisoners' rights particularly by the Indian judiciary brought a ray of hope and prisoners started to demand for their rights. There are plethora of cases wherein the Indian judiciary has effectively come forward to safeguard the existence, rights, and interests of the prisoners.<sup>11</sup> Supreme Court in *D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh*<sup>12</sup>, held that "convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A prisoner is deprived of fundamental rights like the right to move freely throughout the territory of India or the right to practice a profession. But other freedoms like the right to acquire, hold or dispose of property are available to the prisoner. He is also entitled to the right guaranteed by Article 21 that he shall not be deprived of his life or the personal liberty except according to the procedure established by law Therefore, under our Constitution the right of personal liberty and some of the other fundamental freedoms are not to be totally denied to a convict during the period of incarceration."

Supreme Court in *Charles Sobraj v. Superintendent, Central Jail, Tihar*<sup>13</sup>, affirmed that "the court is reluctant to intervene in the day-to-day operation of the State penal system; but undue harshness and avoidable tantrums, under the guise of discipline and security, gain no immunity from court writs. The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise... imprisonment does not spell farewell to fundamental rights".

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<sup>10</sup> Tomer Einat and Sharon Rabinovitz, "A Warm Touch in a Cold Cell: Inmates' Views on Conjugal Visits in a Maximum-Security Women's Prison in Israel", Vol. XX(X), 2012, *International Journal of Offender Therapy and Comparative Criminology* 1-24 at 2.

<sup>11</sup> *Kharak Singh v. State of UP*, 1964 SCR (1) 332; *George Fernandes v. State of Maharashtra*, (1964) 66 BOMLR 185; *Jagmohan Singh v. State of U.P.*, AIR 1973 SC 947; *Sheila Barse v. Union of India*, 1994 (4) SCALE 493; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416; *Re-Inhuman Conditions in 1382 Prisons*, (2017); *State of Maharashtra v. Prabhakar Pandurang Sanzgir*, 1986 (1) BomCR 272; *In Re: Contagion of Covid 19 Virus in Prisons*, (2020)

<sup>12</sup> 1975 SCR (2) 24

<sup>13</sup> 1979 SCR (1) 512

Further, in *State of Andhra Pradesh v. Challa Ramkrishna Reddy*<sup>14</sup>, the Apex Court observed that “a prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution.”

Pointing out the objectives of punishment, the Supreme Court in *Sunil Batra v. Delhi Administration*<sup>15</sup>, (popularly known as Sunil Batra-I) observed that “punishments, in civilised societies, must not degrade human dignity or wound flesh and spirit. The cardinal sentencing goal is correctional; changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practises dehumanizing techniques it is wasteful, counter-productive and irrational, hovering on the hostile brink of unreasonableness. Nor can torture tactics jump the constitutional gauntlet by wearing a 'preventive' purpose. Naturally, inhumanity, masked as security, is outlawed beyond backdoor entry, because what is banned is brutality, be its necessity punitive or prophylactic.”

Hon'ble Supreme Court in *Sunil Batra v. Delhi Administration*<sup>16</sup>, (popularly known as Sunil Batra-II) said that “prisons are built with stones of law' and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed ill a little, brief authority', when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock... subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected.” In this case, the Court said that “whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods 'right, just and fair'” and mandated to safeguard the legal rights of prisoners. Further, the Court reminded that “a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the court armed with the Constitution.”

In *Poola Bhaskara Vijayakumar v. State of Andhra Pradesh*<sup>17</sup>, Andhra High Court observed that “a prisoner does not cease to be a person merely because he is a prisoner: a prisoner may not enjoy his right to full life and personal liberty guaranteed in Art. 21 because his imprisonment has subtracted a portion of that right. But to the extent that enjoyment of the guaranteed right of Art. 21 is not inconsistent with his condition of imprisonment, a prisoner is still entitled to the protection of Art. 21 of the Constitution. Law no longer is based upon the theory that a convicted person suffers from all public and private legal disabilities.”

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<sup>14</sup> AIR 2000 SC 2083

<sup>15</sup> AIR 1978 SC 1675

<sup>16</sup> 1980 SCR (2) 557

<sup>17</sup> AIR 1988 AP 295

"The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates."<sup>18</sup> Thus, it is evident from the above that the Indian judiciary has actively evolved mechanisms to protect the rights of prisoners by liberally interpreting the constitutional provisions in favour of the prisoners particularly Article 21 wherein the right to life and personal liberty of everyone is guaranteed. Earlier the connotation 'right to life' was narrowly interpreted by the courts but the Supreme Court in *Maneka Gandhi v. Union of India*<sup>19</sup>, widened its meaning, by including a dignified life. Madras High Court<sup>20</sup> said that "dignity is an inseparable facet of human personality... Dignity is the core value of life and personal liberty which infuses every stage of human existence. Human dignity is an essential element of a meaningful existence. The right to a dignified life existence is central to the pursuit of a meaningful existence. Dignity ensures the sanctity of life." Though, various rights of prisoners have been evolved by the judicial interpretations but the right to procreate and conjugal visits could not be effectively pleaded earlier before the Supreme Court.

In India, there is no any statute, rules or policy specifically dealing with the right to procreate and conjugal visits of the prisoners even in the era of human rights for which the whole world community is attempting to respect, protect and safeguard it. Not only this, the Jail Reforms Committees which were constituted from time to time also failed to consider this particular issue. Actually, this right was never the matter of consideration on the part of prison administration or the government. It was thought that when a prisoner was temporarily released on parole or furlough, he/she could exercise this right. Granting temporary release from the prison is within the jurisdiction of State Governments. There is no any central legislation dealing with parole and furlough having uniform norms for the whole country. *The Model Prison Manual, 2016*<sup>21</sup>, which is intended to provide uniform laws, rules and regulations to govern prison administration all over the country, has elaborately contained the provisions for prisons and prisoners but it does not deal with right to procreate and conjugal visits. This Manual in its Chapter XIX deals with parole and furlough but it does not contain the ground of parole and furlough for procreation and conjugal meets. It is noteworthy that having the system of procreation and conjugal meets in prisons, taking care the prisoners' privacy, is very helpful for the State, the prisoners, their spouses and the society as whole as under-

- Less cases of homosexuality and sexual offences in prisons will be reported.
- Prisoners, being mentally, physically and emotionally satisfied, will adhere prison norms. It will positively alter the behaviour of the prisoners.

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<sup>18</sup> *Jasvir Singh v. State of Punjab*, 2015 Cri.L.J. 2282 (Punjab-Haryana)

<sup>19</sup> AIR 1978 SC 597

<sup>20</sup> *Rahmath Nisha v. Additional Director General of Prison*, WP(MD)No.12488 of 2019 on 28 May, 2019 (Madras)

<sup>21</sup> Available at <https://www.mha.gov.in/sites/default/files/PrisonManual2016.pdf>

- Spouses of the prisoners may discharge their religious, cultural and other obligations.

Actually, “conjugal visit programs decrease the tension and stress of prison life, which in turn reduces the amount of violence, including sexual assault, within prison walls.”<sup>22</sup> A report prepared by the University of Alabama mentions some of the major benefits of conjugal visits as: (1) the preservation of family life; (2) an additional incentive for positive institutional behaviour; (3) potential reduction in escapes (4) reduction of sex problems and homosexuality; and (5) the potential for improved prisoner morale.<sup>23</sup>

The ban on spousal visits was found to be grossly disproportionate and a violation of the fundamental right guaranteed under Article 21 of the Constitution of India by the Madras High Court in *J. Vidhya v. Additional Director General of Prison*<sup>24</sup>. Supreme Court in *Rama Murthy v. State of Karnataka*<sup>25</sup>, has correctly mentioned the importance of prison visit by the spouse in the following terms-

“Visit by him/her has special significance because a research undertaken on Indian prisoners sometime back showed that majority of them were in the age group of 18 to 34, which shows that most of them were young and were perhaps having a married life before their imprisonment. For such persons, denial of conjugal life during the entire period of incarceration creates emotional problems also. Visits by a spouse is, therefore, of great importance.”

Further, the court<sup>26</sup> noted that “if the offenders and visitors are screened, the same emphasises their separation rather than retaining common bonds and interests. There is then urgent need to streamline these visits.”

Recognising the privacy rights of the prisoners, the Madras High Court in *Rahmath Nisha v. Additional Director General of Prison*<sup>27</sup>, said that “when a prisoner meets his wife, he may like to hold her hands. His emotions are bound to find a physical expression. While private prison cottages may be a distant prospect, the privacy and dignity of the prisoners should be scrupulously protected. Conversations between prisoner and his spouse should be unmonitored. Of course, not only the prisoner but also the spouse shall be carefully searched before and after the interview. The prison authorities are obliged to facilitate the meetings between the prisoner and his wife in a reasonably private sitting.”

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<sup>22</sup> Rachel Wyatt, “Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?”, Vol. 37: 2 & 3, 2006 *Case Western Reserve Journal of International Law* 579-614 at 579.

<sup>23</sup> *National Institute of Law Enforcement and Criminal Justice*, available at <https://www.ojp.gov/pdffiles1/Digitization/39387NCJRS.pdf>

<sup>24</sup> W.P.(MD)No.20995 of 2021 on 25 November, 2021 (Madras)

<sup>25</sup> (1997) 2 SCC 642

<sup>26</sup> (1997) 2 SCC 642

<sup>27</sup> 2020 (2) CTC 417

The system of parole or furlough is evolved as a 'penological innovation for checking recidivism'<sup>28</sup> and is not available on the ground of 'procreation and conjugal meets' in India.

As there is no any statutory provision for prisoners' right to procreate and conjugal visits, they have taken the recourse of Article 21 of the Constitution to enforce this right. Recently, Rajasthan High Court has ruled that Article 21 'includes within its ambit the prisoners also.'<sup>29</sup> In 2010, hearing a Public Interest Litigation on treatment facilities of HIV positive prisoners, the Bombay High Court through Justice P B Majumdar and Justice R G Ketkar asked the state government to explore the possibility of facilitating prisoners, who have been lodged for two to three years in jails, to meet their wives sometime every month in total privacy. Justice Majumdar observed, "There may be physical needs. See whether a separate place can be given to a prisoner and his wife for a day or two. The government is spending crores of rupees to curb the AIDS menace in jails. Instead why don't you take preventive steps".<sup>30</sup>

In respect of prisoners' right to procreate and conjugal visits, an unsuccessful attempt was made in the year 2012 before the Andhra Pradesh High Court in form of a Public Interest Litigation i.e. *G. Bhargava v. State of Andhra Pradesh*<sup>31</sup>, wherein the Hon'ble High Court rejected the prayer made by the petitioner seeking a direction to the State to take immediate steps and allow the prisoners to have a conjugal visit to the spouses of prisoners across the State of Andhra Pradesh. The Court, refusing the contentions of the petitioner that conjugal visits are covered by Article 21, observed that the right and liberty of the prisoner to live with human dignity in the four corners of the prison is not taken away and the same will be governed in accordance with the guidelines and regulations framed by the State for maintenance of the jails. Further, the court observed that "even if such conjugal visits are to be allowed such visits will have to be necessarily allowed to only select prisoners as per rules keeping in view their good behaviour during the period of imprisonment actually undergone in the prison. In such a situation, chances of the environment in the jail getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit or allowance and this may lead to new difficulties." Furthermore, the court noted that "to mitigate the situation and to enhance continued relationship of prisoners with their spouses, if necessary, suitable amendments may be brought to the Prison Rules for sanction of longer periods of furlough/leave to enable them to stay with their spouses, at least in respect of prisoners who are at the prime age whenever they avail the benefit of furlough/leave."

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<sup>28</sup> *Suresh Chandra v. State of Gujarat*, AIR 1976 SC 2462

<sup>29</sup> Supra note 1

<sup>30</sup> Why can't prisoners have sex in jails, court asks Maharashtra govt, *Times of India*, 14 January, 2010 available at <https://timesofindia.indiatimes.com/india/majority-of-street-children-face-sex-abuse-in-india-study/articleshow/5445351.cms>

<sup>31</sup> PIL No. 251 decided on 16<sup>th</sup> July, 2012



In *Jasvir Singh v. State of Punjab*<sup>32</sup>, the wife and husband, convicted prisoners, were lodged in same jail but in separate cells in respect of kidnapping and murdering a minor for ransom. They requested the Punjab and Haryana High Court to command jail authorities to allow them to live together and resume their conjugal life for the sake of progeny. Their claim was based on Article 21 of the Indian Constitution which allows propagation of species for which sex life is important. The following issues to be decided by the Courts were there-

- (i). Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework?
- (ii). Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
- (iii). Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
- (iv). If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Discussing various international, regional and Indian instruments, the Court observed that-

"[T]here is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements. The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework."

Further, the court said that-

"The right to conjugal visits or procreation inheres right to privacy, dignity, respect and free movements as well. Good behaviour of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. are several other relevant factors to determine the extent and limitations for translating such a right into reality... Jail reforms have been the priorities of none. A little improvement in guaranteeing basic human rights, though still far from satisfactory, has happened with the tireless efforts of the Indian judiciary and a constant monitoring through jail inspections by the District and High Courts with due help from the public spirited organizations and individuals from the civil society. None of the

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<sup>32</sup> 2015 Cri.L.J. 2282 (Punjab-Haryana)

serious issues like overcrowding, lack of clean and sufficient toilets, requisite and healthy food, medical facilities, telecommunication facilities or re-orientation have been addressed nor there appears to be any commitment of the executive in this direction. There are no comprehensive plans for rehabilitation and re-settlement of the convicts on their release and many of them step out of a dark hole to fall into a darker ditch.”

The Court directed to the State Government to form a Jail Reforms Committee to formulate, *inter alia*, a scheme for creation of an environment for conjugal and family visits for jail inmates and identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities. The Committee was also asked to classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child.

In *Meharaj v. State*<sup>33</sup>, the wife of a life convict prisoner approached the Madras High Court to grant him leave for thirty days to assist her in the infertility treatment to be undergone by her. The Court analysing various cases held that-

“Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because, they are termed as prisoners, their right to dignity cannot be deprived... [P]risons have to be transformed as homes for the purpose of giving training morally as well as intellectually, so that the prisoners are denuded of the qualities of a criminal. The psychologists and psychiatrists believe that the frustration, tension, the ill feelings and the heart burnings can be reduced and a human being can be better constructed if they are allowed conjugal relationship even rarely... Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact.”

Further, the court has nicely elaborated the need of conjugal visits as under-

“Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution. Today, conjugal visits are called extended family visits (or, alternately, family reunion visits). The official reason for these extended family visits is three-fold: to maintain the relationship between the prisoner and the members of his family, to reduce recidivism, and to motivate or to provide an incentive for the good behavior.”

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<sup>33</sup> H.C.P. No.1837 of 2017 on 11 January, 2018 (Madras)

In this case, the High Court granted temporary leave initially for a period of two weeks to the convicted prisoner.

Again the same wife, as mentioned in above case, approached the Madras High Court on the same ground after three years in *Meharaj v. State*<sup>34</sup>. The court, distinguishing between the status of law abider and violator, warned to take a cautious decision so that the ratio propounded by the court is used for the purpose and it should not be claimed as a course. The Court mentioned that “a convict cannot enjoy all the liberties as are available to a common person, otherwise there would no difference between a law-abiding citizen and a law-violating prisoner... The denial of conjugal relationship of the convict for specific purpose may amount to denial of the fundamental right guaranteed under Article 21 of the Constitution of India. The specific purpose may be infertility treatment or some similar reason, but it should not be construed to be a fundamental right for having conjugal relationship as a course. This would make a difference between the law abider and violator in regard to rights guaranteed under Article 21 of the Constitution of India.” Further, the court held that “if leave for having conjugal relationship is recognized to be a right under Article 21 of the Constitution of India, the prayer of similar nature can be made by the accused or his/her spouse time and again to have conjugal relationship.” Thus, it is evident from this decision that the court is very cautious in authorising prisoners for fulfilling their right under Article 21 of the Constitution. In this case, the court restricted the scope of the availability of prisoners’ conjugal visits only for specific purpose.

In *P.Muthumari v. Home Secretary (Prison)*<sup>35</sup>, the wife of a life convict prisoner requested the Madras High Court to grant parole for two months for the purpose of conjugal visit. Following the ratio of *Meharaj v. State*<sup>36</sup>, the Court accepted the request of parole of two months for conjugal visits.

On the basis of ratio of the *Jasvir Singh v. State of Punjab*<sup>37</sup>, the prisoners’ right to procreate and conjugal meets have been accepted and enforced in *Arun v. State of Haryana*<sup>38</sup>, wherein the petitioner requested to grant parole for conjugal visit and procreation.

In *Rajeeta Patel v. State of Bihar*<sup>39</sup>, the petitioner, the wife of a prisoner, requested the Patna High Court to grant her husband, who was convicted and detained in a jail, to get a leave of about 90 days for purpose of conjugal visits and to take care of the infertility problem by providing medical treatment of the petitioner so that she may beget a child. The Court discussing the historical prison system in India and leading cases related to personal liberty and being in complete agreement with the views expressed by Hon’ble Punjab & Haryana High Court in

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<sup>34</sup> H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)

<sup>35</sup> H.C.P. No.2447 of 2018 on 26 November, 2018(Madras)

<sup>36</sup> Supra note 33.

<sup>37</sup> Supra note 32.

<sup>38</sup> CWP No.3311 of 2019 on 12 April, 2019 (Punjab-Haryana)

<sup>39</sup> Criminal Writ Jurisdiction Case No.1868 of 2019 on 12 October, 2020 (Patna)

*Jasvir Singh v. State of Punjab*<sup>40</sup>, held that "the "right to life" and "personal liberty" guaranteed in Article 21 of the Constitution of India would include the rights of convict or jail inmates for conjugal visits or artificial Insemination (in alternative)... Medical check-ups and treatment of the petitioner for infertility is an essential part of this right and without allowing husband of the petitioner to get his wife treated for such purpose the concept of this right under Article 21 of the Constitution of India shall remain only a hollow and shallow concept."

In *Neha v. State of Haryana*<sup>41</sup>, the wife of a convicted prisoner requested the court to grant parole to her husband to have conjugal relations for procreation with an alternative prayer to allow them to procreate/maintain conjugal relation within the jail premises. The Punjab-Haryana High Court took the note of the Full Bench of Madras High Court in *Meharaj v. State*<sup>42</sup>, wherein the Court has quite categorically opined that the right to have conjugal relations is not an absolute right and what is available to a convict is his right to obtain infertility treatment. It has gone on to state that a convicted person cannot enjoy the same rights those available to a common man because there must be a distinction between a law-abiding citizen and law-violating prisoner.

Bombay High Court in *Ashwin Bansi Sapkale v. State of Maharashtra*<sup>43</sup>, refused to grant the parole to the convict prisoner for whom his wife requested the court. Actually, they were married in 2014 and they had one daughter from their wedlock and she was desirous of having another child from her husband. The Court followed the ratio of the Full Bench of Madras High Court in *Meharaj v. State*<sup>44</sup>.

Before Rajasthan High Court again the issue of conjugal meet was raised in a recent case of *Nand Lal v. State*<sup>45</sup>, wherein the convict prisoner was lodged in jail serving the life imprisonment. The Bench, consisting Hon'ble Farjand Ali and Sandeep Mehta, JJ., allowed the prisoner to be released on emergent parole for a period of fifteen days on the ground of his wife to have progeny. The court recognised the right of innocent wife who was neither involved in committing the offence nor under any punishment but her right of conjugal association and progeny is being violated only because of her husband's punishment. Recognising the religious philosophies, the Indian culture and various judicial pronouncements, the court protected right to progeny for the purpose of preservation of lineage. The court ruled that "the spouse of the prisoner is innocent and her sexual and emotional needs associated with marital lives are effected and in order to protect the same, the prisoner ought to have been awarded cohabitation period with his spouse. Thus, viewing from any angle, it can safely be concluded that the right or wish to have progeny is available to a prisoner as well subject to the peculiar facts and circumstances of each case. Simultaneously,

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<sup>40</sup> Supra note 32.

<sup>41</sup> CRWP-2526-2021 on 27 January, 2022 (Punjab-Haryana)

<sup>42</sup> Supra note 34.

<sup>43</sup> Criminal Writ Petition No.217 of 2022 on 9 March, 2022 (Bombay)

<sup>44</sup> Supra note 34.

<sup>45</sup> D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan)

it is also found apposite to hold that the spouse of the convict-prisoner cannot be deprived of his or her right to get progeny.”

### **Spouse's Conjugal Right *versus* Prisoner's Punishment:**

Historically, the institution of marriage was developed to achieve various objectives out of which the procreation and conjugal meets is of prime concern which is based on love, affection, trust and complete dedication of both the parties for each other which ultimately results in emotional attachment, personality development, family bonding and evolution of new life from their wedlock. Every person's dream is to marry and procreate through conjugal meets with lawful spouse which is completely protected under the constitutional framework. At the same time, when a person is detained in a prison because of involvement in any offence, his/her spouse, not being at any fault, is dissociated from his/her partner's companionship which finally results in violation of his/her rights guaranteed in various instruments. For such violation, in India, there is lack of statutory provisions.

“The desirability of conjugal visits has been a topic of speculation in the correctional field for a number of years. The focus of the debate to date has been primarily on correctional considerations rather than on the needs or wishes of the prisoner's spouse. The desirability of conjugal visits is a question that could and should be answered by the prisoner's spouse. To deny conjugal visits to any spouse who wants them should be considered a denial of that person's civil and human rights.”<sup>46</sup>

There is a maxim *ubi jus ibi remedium* meaning thereby 'where there is a right, there is a remedy'. If this maxim is applied in case of a prisoners' spouse rights, particularly the right to conjugal meets, the statutory provisions are silent. In such circumstances, the responsibilities are there with judiciary which is the protector of fundamental rights of every person. The judiciary must decide the matters in the light of rights of innocent spouse of the prisoner whose rights and interests should be protected, promoted and prioritised at any cost as he/she, being completely innocent, should not be punished.

Rajasthan High Court in *Nand Lal v. State*<sup>47</sup>, has recently held that “denial to the convict-prisoner to perform conjugal relationship with his wife more particularly for the purpose of progeny would adversely affect the rights of his wife.”

### **Concluding Observations:**

Portraying the correct position of prisoners' rights in India, the Madras High Court<sup>48</sup> said that-

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<sup>46</sup> Donald P. Schneller, “Conjugal Visitation—Prisoners's Privilege or Spouse's Right”, Vol. 2: 2, 1976, *New England Journal on Criminal Law*, 165-171 at 165.

<sup>47</sup> Supra note 45.

<sup>48</sup> *M. Rajeshwari v. Additional Director General of Police (Prison), Chennai*, W.P.(MD) No. 1246 of 2021 on 04 February 2021 (Madras)

“Quarter century passed; rights of prisoners have traversed hither to unknown path; reached mile stone in recognizing the conjugal rights of the prisoners. Still, wailing of prisoners goes unabated, getting some times louder and sometimes in silence ... still miles to go.”

The conditions of prisoners in prisons are abhorable and they are bound to live in unhealthy, unhygienic and adverse atmosphere wherein there is no respect for their human rights. They are being treated by the prison officials as objects having no legal entity or existence. In such situation, the protection of prisoners' rights on the part of State is meaningless and there is only one entity *i.e.* judiciary which is being looked by every weak, suppressed, depressed, helpless and vulnerable person to redress his/her grievances. And then, the judiciary is expected to play proactive role for protecting and promoting the rights of prisoners and their spouses. Unexpectedly, there are conflicting judgements particularly on the prisoners' right to procreate and conjugal visits because of which there is dilemmatic situation. At the first time in India, the prisoners' conjugal visit was legally recognised by Punjab-Haryana High Court in the year 2014<sup>49</sup> and it was followed by it in 2019<sup>50</sup> also but in the year 2022<sup>51</sup> the same Court limited scope of this right following the Madras High Court judgement<sup>52</sup>. Patna High Court in 2020<sup>53</sup> and Rajasthan High Court in 2022<sup>54</sup> followed the *Jasvir Singh v. State of Punjab*<sup>55</sup>. Bombay High Court in 2022<sup>56</sup> refused to entertain claim of conjugal visit. Madras High Court in 2018<sup>57</sup> followed the ratio of *Jasvir Singh v. State of Punjab*<sup>58</sup>, but in 2021<sup>59</sup> it completely changed the scenario by limiting the scope of this right only for specific purpose. In this situation, it is very much necessary to clarify the legal position on the part of Hon'ble Supreme Court taking into its account the rights of prisoners' spouse in the light of human rights jurisprudence.

Next, the Legislature must also come forward to safeguard the rights of prisoners and their spouses by enacting special provisions or inserting a new ground of parole or furlough in the light of views of Anthony M. Scacco, Jr.<sup>60</sup> expressed in 'Rape in Prison' that “sex is unquestionably the most pertinent issue to the inmate's life behind bar... There is a great need to utilize the furlough

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<sup>49</sup> Supra note 18.

<sup>50</sup> *Arun v. State of Haryana*, CWP No.3311 of 2019 on 12 April, 2019 (Punjab-Haryana)

<sup>51</sup> *Neha v. State of Haryana*, CRWP-2526-2021 on 27 January, 2022 (Punjab-Haryana)

<sup>52</sup> *Meharaj v. State*, H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)

<sup>53</sup> *Rajeeta Patel v. State of Bihar*, Criminal Writ Jurisdiction Case No.1868 of 2019 on 12 October, 2020 (Patna)

<sup>54</sup> *Nand Lal v. State*, D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan); Followed in: *Rahul v. State of Rajasthan*, D.B. Criminal Writ Petition No. 428/2022 on 14 October, 2022 (Rajasthan), *Ashok Kumar v. State of Rajasthan*, SOSA-549/2022 on 18 October, 2022 (Rajasthan).

<sup>55</sup> Supra note 32.

<sup>56</sup> *Ashwin Bansi Sapkale v. State of Maharashtra*, Criminal Writ Petition No.217 of 2022 on 9 March, 2022 (Bombay)

<sup>57</sup> *Meharaj v. State*, H.C.P. No.1837 of 2017 on 11 January, 2018 (Madras); *P.Muthumari v. Home Secretary (Prison)*, H.C.P. No.2447 of 2018 on 26 November, 2018(Madras).

<sup>58</sup> Supra note 32.

<sup>59</sup> *Meharaj v. State*, H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)

<sup>60</sup> Quoted in: Supra note 18.

system in corrections. Men with record showing good behaviour should be released for weekends at home with their families and relatives". Further, there is urgent need of a national prisoner rights policy covering the all-round protection of prisoners and prioritising conjugal rights of prisoners' spouses. The conjugal meets may be effectively facilitated by constructing conjugal meets cottages in association with private enterprises within prison premises without having any economic burden on the State.

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